No. 81-88

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In the Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL 394, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner Union violated Section 8(b)(1)(A) and Section 8(b)(2) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A) and 158(b)(2), by refusing to refer two workers for employment through its exclusive hiring hall because they opposed the Union's leadership and filed unfair labor practice charges against the Union.

2. Whether the Board properly refused to accept a settlement agreement.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is not reported. The decision and order of the National Labor Relations Board (Pet. App. 3a-136a) are reported at 247 N.L.R.B. No. 5.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on April 7, 1981. The petition for a writ of certiorari was filed on July 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner ("the Union") operates an exclusive hiring hall in Elizabeth, New Jersey, through which it refers job applicants to area contractors (Pet. App. 12a, 20a-21a). Under the established practice in the area, one cannot obtain a job

as a laborer in the Union's jurisdiction without a referral through the hiring hall (*id.* at 15a-18a). John Riggi, the Union's business manager, is in charge of selecting the job applicants who will receive referrals (*id.* at 12a-21a, 123a). Riggi and his assistants choose among the applicants on the basis of subjective criteria (*id.* at 123a).

Wakil Abdunafi and Adolph Farmer are both longstanding members of the Union (Pet. App. 38a, 106a). Before 1971, both men worked steadily by Riggi's referrals, and on a number of occasions, Riggi selected them to fill openings in the highly desired foreman and steward positions (*id.* at 67a-70a, 106a-109a).[1] During 1971, Abdunafi and Farmer became openly critical of various policies that had been implemented or fostered by Riggi and the other executive officers. In particular, they objected to Riggi's personal control over the hiring hall. At union meetings that year, Abdunafi and Farmer became embroiled in heated clashes with the union leadership over their complaints that the union leaders were abusing their authority (*id.* at 38a-39a). At a union meeting in June 1971, when the two men charged that Riggi had unfairly selected his father and other workers for referrals, Riggi threatened to "hit them in the pocketbook where it hurts" (*id.* at 39a). Thereafter, in 1971, Riggi refused to refer Abdunafi to any jobs, although Abdunafi reported regularly to the hall seeking work (*id.* at 125a). Farmer, who, according to the Union's own records, had worked approximately 1600 hours annually through hiring hall referrals during the previous 18 years, worked only 91 hours in 1971, although he reported to the hall more frequently than anyone else (*id.* at 106a, 109a).

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[1]These jobs are "particularly prized" by the workers because, under the contract between the Union and the area employers' association, stewards are the last to be laid off, and foremen are guaranteed a 40-hour week and are paid at a higher rate (Pet. App. 70a).

Throughout the following years, Abdunafi and Farmer continued their quest for reforms in the Union's referral system and in other policies of the union leadership. They complained to the Union's International office, and filed internal union charges against Riggi and the executive board (Pet. App. 54a, 101a-103a).[2] In September 1972, the Union's executive board filed charges against Farmer, claiming that he had used foul language while presenting his views at a union meeting. After an internal union hearing on these charges, Farmer was found guilty and suspended from all union meetings for five months (*id.* at 102a). In April 1973, Abdunafi successfully challenged the leadership's appointment of a new vice-president as contrary to the Union's constitution. That same month, Riggi filed charges against Abdunafi, claiming that he had used foul language at the meeting where his charges about the vice president's appointment were heard. Thereafter, Abdunafi was found guilty of the alleged misconduct and suspended from all union meetings for a year (*id.* at 47a-50a). In addition, during these years in the mid-1970's, Riggi refused to refer Farmer for employment unless Farmer's brother, Nick Farmer, was working as a steward or foreman on a jobsite and had specifically requested and obtained Riggi's permission to use him (*id.* at 110a). Riggi gave Abdunafi short-term jobs during these years; he was able to obtain jobs longer in duration only through Nick Farmer's specific requests to use Abdunafi on jobsites where he was working (*id.* at 71a-77a).

In December 1974, Abdunafi filed an unfair labor practice charge alleging that the Union was operating its hiring hall in an unlawful manner. Farmer gave an affidavit to the

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[2]Although other union members filed internal charges against the Union, no one except Abdunafi and Farmer filed charges against Riggi personally (Pet. App. 101a).

Board in support of these allegations. Thereafter, throughout 1975, neither Abdunafi nor Farmer received a single referral directly or indirectly from Riggi or his assistants (Pet. App. 113a, 125a). When his initial charges were dismissed, Abdunafi filed new unfair labor practice charges with the Board on July 1, 1975. These are the charges involved in the present case (*id.* at 55a). During 1976, while the charges were pending, Abdunafi obtained only 26 hours of work, although he reported regularly to the hiring hall. Abdunafi was able to work the 26 hours only because Nick Farmer specifically requested that Riggi permit him to use Abdunafi (*id.* at 92a).[3] Likewise, Adolph Farmer did not work in 1976 or 1977, except through the intervention of his brother (*id.* at 126a-129a).

In early 1977, while Abdunafi continued his campaign for reforms in the Union Local, the executive board filed internal charges against him for defamation and slander. After a hearing on these charges, Abdunafi was suspended from all union meetings for the next two years (Pet. App. 59a-60a). For the remainder of 1977, he again received no referrals from Riggi, though he reported regularly to the hall ready, willing, and able to work (*id.* at 92a).

The administrative law judge, whose decision was adopted by the Board, held that the Union violated Sections 8(b)(1)(A) and 8(b)(2) of the Act, 29 U.S.C. 158(b)(1)(A) and 158(b)(2), by operating its exclusive hiring hall in a discriminatory manner and "by discriminatorily failing and refusing to refer Wakil Abdunafi and Adolph Farmer to jobs through its exclusive job referral system since on or about January 1, 1975, in retaliation for their having

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[3]Since 1971, when Abdunafi began criticizing the Union's policies, Riggi refused ever again to permit him to work as a steward or foreman (Pet. App. 70a). In March or April 1976, when Nick Farmer advised Riggi that a foreman's job was opening at a site where Farmer was then working, Riggi explained that he would not permit Abdunafi to be foreman because "it would not look good" (*id.* at 100a).

engaged in protected concerted activities including their having filed internal charges against the Union's leadership and charges with the National Labor [Relations] Board" (Pet. App. 130a). In reaching his decision, the administrative law judge considered the repeated clashes between the two men and the union leaders, the actions and statements of the union leaders concerning the men, and the fact that, during the years in question, Abdunafi and Farmer reported regularly to the hall seeking work and were unsuccessful, while other workers, including some who arrived after Abdunafi and Farmer, were repeatedly given referrals (*id.* at 82a, 113a, 124a-129a). The administrative law judge rejected as "an afterthought" the Union's claim that Abdunafi's lack of work could be explained by his late arrivals at the hiring hall. In the judge's words, "whether [Abdunafi] arrived before or after other individuals, the others were referred out before him" (*id.* at 67a). Similarly, the administrative law judge found that the Union's explanations for Farmer's failure to obtain referrals were "lacking in credibility" (*id.* at 127a).

The court of appeals, in an unpublished memorandum decision, sustained the Board's findings and conclusions, and enforced its order (Pet. App. 1a-2a).

ARGUMENT

1. The Union asserts (Pet. 9-11) that the Board improperly relied on events that were time-barred under the Act in reaching its conclusion that the Union improperly discriminated against Abdunafi and Farmer on the basis of their opposition to the policies of the union leadership.[4] There is no merit to this contention. This Court recognized in *Local*

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[4]Section 10(b) of the Act, 29 U.S.C. 160(b), provides, in pertinent part, that "no complaint shall issue upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board * * *."

Lodge No. 1424, International Association of Machinists v. *NLRB*, 362 U.S. 411 (1960), that "evidence as to events during the barred period" may be "used to illuminate current conduct claimed in itself to be an unfair labor practice." *Id.* at 419-420. Here, the conduct found to constitute unfair labor practices was the Union's treatment of Abdunafi and Farmer with respect to job referrals beginning January 1, 1975, the date that the Section 10(b) period commenced. The administrative law judge found that neither man had been referred to any jobs throughout 1975, even though both reported to the hiring hall more than anyone else. Other workers, by contrast, were referred out to "5, 6, 7 or more jobs in that year" (Pet. App. 79a, 113a). In these circumstances, it was entirely proper for the administrative law judge to consider Abdunafi's and Farmer's prior work history as well as their previous activities in opposing the policies of the union leadership as background to the Union's current failure to refer the men.[5]

Accordingly, the only issue actually raised is whether substantial evidence supports the Board's finding, upheld by the court of appeals. That factual issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). In any event, as shown above (see

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[5]Equally without merit is the Union's assertion (Pet. 10) that it was prejudiced because the Board made findings based on evidence that postdated the complaint. It has long been recognized that "the Board is not precluded from 'dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.' " *NLRB* v. *Fant Milling Co.*, 360 U.S. 301, 309 (1959), quoting *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 369 (1940). The Union does not dispute that its conduct toward Abdunafi and Farmer with respect to referrals after the complaint issued was fully litigated at the hearing or that such conduct was related to that alleged in the charge. Moreover, the complaint alleged that the Union had unlawfully refused to refer Abdunafi "since January 1, 1975."

pages 1-5, *supra*), the record amply supports the Board's findings.

2. The Union also contends (Pet. 5-8) that the General Counsel, with the Board's approval (Pet. App. 124a), improperly refused to accept the settlement agreement proposed prior to the unfair labor practice hearing in this matter. This argument is insubstantial. It has long been established that settlement agreements reached with the Board's regional offices are " 'merely preliminary negotiations' in no way binding on the General Counsel" since he alone "is vested with final authority [under the Act] to bind the government by compromise or by settlement." *Trinity Valley Iron & Steel Co.* v. *NLRB*, 410 F. 2d 1161, 1169 (5th Cir. 1969), quoting *NLRB* v. *Armstrong Tire & Rubber Co.*, 263 F. 2d 680, 682 (5th Cir. 1959).

Moreover, the General Counsel acted well within his statutory discretion in refusing to accept the proposed agreement. The proposal failed to provide backpay to Abdunafi and Farmer for the Union's unlawful refusal to refer them for employment. To this extent, it failed to vindicate "the public policy which the Board enforces," *i.e.*, to make "workers whole for losses suffered on account of an unfair labor practice." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197 (1941). Thus, contrary to the Union's claim (Pet. 8), the General Counsel's rejection of the proposed settlement agreement was entirely consistent with public and statutory policy and presents no issue warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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